No. 85-1665

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

JOSEPH PROBE and DONALD SIMMONS, on behalf of themselves and all other persons similarly situated; ROBERT DANBOM and HARRY VIX, on behalf of themselves and all other persons similarly situated; WILLIAM BAYER and BERT DAVIS, on behalf of themselves and all other persons similarly situated; GEORGE WING, on behalf of himself and all other persons similarly situated; and GARTH BELKNAP and ROBERT RAY, on behalf of themselves and all other persons similarly situated,

Petitioners,

VS.

STATE TEACHERS' RETIREMENT SYSTEM and TEACHERS' RETIREMENT BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Should retroactive relief to the date of *City of Los Angeles v. Manhart* have been awarded under the circumstances of this case where an employer operated a pension system offering optional retirement plans which calculated benefits based on sex-based actuarial tables?

Where a violation of Title VII has been found can equalization of benefits be awarded against a pension plan, when there is no direct correlation between employee contributions and benefits paid?

PARTIES TO THE PROCEEDING

The parties to the proceedings below are Joseph Probe and Donald Simmons, Robert Danbom, Harry Vix, William Bayer, Bert Davis, George Wing, Garth Belknap and Robert Ray, on behalf of themselves and all other persons similarly situated, Petitioners-Appellees-Cross-Appellants; State Teachers' Retirement System and Teacher Retirements' Board, Defendants-Appellants and Cross-Appellees.

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VS.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners on behalf of themselves and all others similarly situated, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit

("Court of Appeals") entered in the above-entitled case on January 13, 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 780 F.2d 776 (9th Cir. 1986) (Appendix "A" hereto). The Opinion of the United States District Court for the Central District of California entered September 14, 1981 is unofficially reported at 27 FEP 1306 (C.D.Cal. 1981) (Appendix "B" hereto).

JURISDICTION

The Judgment of the Court of Appeals was entered on January 13, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2, 2000e-5(g) and Section 24200 of the California Education Code.

Title VII of the Civil Rights Act of 1964, as amended provides in the relevant sections:

> "(a) It shall be an unlawful employment practice for an employer —
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a)(1).
>
> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging

in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organizations, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-(3)(a) of this title." 42 U.S.C. § 2000e-5(g).

California Education Code § 24200 is printed in full in Appendix "C" hereto.

STATEMENT OF THE CASE

This case was brought as a class action for a violation of Section 703(a) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-2, and for individual relief for the named Plaintiffs under the Equal Pay Act.

The action challenged whether the State Teachers' Retirement System ("STRS") could use gender-based mortality tables in determining retirement benefits for teachers who elected optional retirement programs which assured income for the joint lives of the retirants and their beneficiaries. The use of these gender-based mortality tables results in the payment of lower retirement benefits to male employees and their beneficiaries.

The United States District Court for the Central District of California, granted judgment in favor of the plaintiffs, ordering STRS to equalize optional benefits and desist from the use of gender based mortality tables and awarding Plaintiffs attorneys' fees; however, the District Court denied Plaintiffs' request for retroactive relief in the form of retrospective equalization of pension benefits to the named Plaintiffs who are already retired and to the class members they represent who are already retired to the date of *City of Los Angeles v. Manhart* 435 U.S. 700, 98 S.Ct. 1379, 55 L.Ed. 1157 (1978).

State Teachers' Retirement System appealed the decision of the District Court, and challenged the class certification, and the amount of attorneys' fees awarded.

Plaintiffs cross-appealed from the District Court's refusal to grant retroactive relief.

Plaintiffs contended that STRS which is an employer operated pension plan was on notice as of the date of *Manhart* that Defendants use of gender-based actuarial tables in calculating benefits violated Title VII, and therefore relief should be retroactive to the date of the decision in *Manhart*.

Further, Plaintiffs contended that the solvency of the plan, enabled it to bear the cost of such relief without jeopardizing the plan and the expectations of the beneficiaries, and therefore retroactive relief was appropriate.

Submission of the case by the Court of Appeals was vacated and deferred until resolution by the United States Supreme Court of *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983).

After the decision in *Norris* was rendered by the Supreme Court, the Court of Appeals, in a unanimous decision affirmed the District Court's judgment on the Title VII class certification and attorneys' fees issue. *Joseph Probe et al. v. State Tecchers' Retirement System*, 780 F.2d 776 (9th Cir. 1986).

The Court of Appeals, however, reversed the lower courts holding with regard to relief, and held that full retroactive relief was not appropriate. The Court held "that benefits derived from contributions made prior to the Supreme Court's decision in *Norris* may be calculated as provided by the existing terms of the State Teachers' Retirement System plan. However, any benefits derived from contributions made after that decision must be recalculated without regard to the sex of the retiree." *Probe, supra* at 783.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

THE DENIAL OF RETROACTIVE RELIEF TO THE DATE OF MANHART DEFEATS THE GOAL OF TITLE VII TO MAKE PERSONS WHOLE FOR INJURIES SUFFERED FROM UNLAWFUL EMPLOYMENT DISCRIMINATION, AND IS CONTRARY TO THE COURT'S HOLDINGS IN ALBERMARLE, MANHART AND NORRIS

Title VII provides that if a respondent has intentionally engaged in an unlawful employment practice, the

Court may enjoin the respondent from engaging in such unlawful employment practice, and order as a remedy back pay, or any other equitable relief as the court deems appropriate. 29 U.S.C. § 2000(e)-5(g).

The Supreme Court in applying this provision has held that

> "it follows that given a finding of unlawful discrimination. back pay should be denied only for reasons which, if applied generally would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albermarle Paper Co. v. Moody* (1975) 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280.

The Supreme Court in *City of Los Angeles v. Manhart*, 435 U.S. 700, 98 S.Ct. 1379, 55 L.Ed.2d 1157 (1978) subsequently held that "The *Albermarle* presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the District Court's duty to determine that such relief is appropriate." *Manhart, supra* at p. 720.

The Court in *Manhart* denied retroactive relief based on two factors. The first was that the decision in *Manhart* was one of first impression, and that prior to *Manhart* pension administrators could reasonably have thought it unfair or unlawful to modify the plan to require equal contributions. *Manhart, supra* at 720. The second consideration the Court acknowledged in denying retroactive relief in *Manhart*, was that the relief could create an undue burden on pension funds and such changes might jeopardize the solvency of a fund. *Manhart, supra* at pp. 722-723.

The *Manhart* Court did not rule out the possibility of retroactive relief against a pension fund under different circumstances.

The Supreme Court addressed the issue of retroactive relief again in its decision in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983). The reasoning of the Court in this regard is set forth in the opinions of Justices Powell and O'Connor.

In *Norris* Justice Powell, reiterated that "retroactive relief is normally appropriate in the typical Title VII case." Adopting the reasoning in *Manhart*, Powell looked to two factors to determine if retroactive relief should be awarded. He found that the employer could reasonably have assumed its plan which made available to its employees annuities offered by insurance companies on the open market was lawful, based on the limitation in *Manhart* that allowed an employer to set aside equal contributions and let each retiree purchase whatever benefit his or her contributions could command on the open market. *Norris, supra*, 463 U.S. at 1106, 103 S.Ct. at 3510.

He then determined that the cost of the relief would range from $817 to $1,260 million annually for the next 15 to 30 years. This cost would be borne by the State of Arizona. *Norris, supra*, 463 U.S. at 1107, 103 S.Ct. at 3510. In light of the question left open in *Manhart*, Justice Powell determined this cost would be too burdensome to the State.

Justice O'Connor, concurring in Justice Powell's decision, limited the nature of relief to equalization of benefits derived from contributions collected after the effective date of the judgment.

Justice O'Connor limited the plaintiffs in *Norris* to prospective relief based on an application of the criteria

set forth in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 105-109, 92 S.Ct. 349, 354-356, 30 L.Ed.2d 296 (1971), *Norris, supra,* 463 U.S. at 1109-1112, 103 S.Ct. at 3512.

Those three criteria are: whether the decision establishes a new principle of law, either by overruling clear past precedent or by an issue of first impression whose resolution was not clearly foreshadowed, whether retroactive relief will further or retard the operation of the statute, and whether retroactive relief would impose inequitable results.

In applying the three-prong test in the context of *Norris,* Justice O'Connor found that *Norris* was controlled by the same principles as *Manhart.*

She also found that retroactive relief would not retard the achievement of the purpose of Title VII. She found, however, that the third criterion, whether retroactive application would impose inequitable results, compelled a prospective decision. In making this evaluation, she determined that the employer would have to disburse more benefits than the fund could support, and therefore would jeopardize the pension fund. *Norris, supra,* 463 U.S. at 1110, 103 S.Ct. at 3512.

The factors set forth in the series of Supreme Court decisions discussed herein would support a finding of retroactive relief to the date of *Manhart* in the case at bar.

Applying the test set forth in *Chevron, supra* to the instant matter, we look first to determine whether State Teachers' Retirement System was on notice as of the date of *Manhart* that offering retirement options that calculated benefits based on sex-based mortality tables violated Title VII.

In 1978, the Court decided the landmark case *City of Los Angeles v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 157 (1978). *Manhart* involved a municipal

agency's plan that required females to contribute more than similarly situated males because mortality tables indicated that women live longer. *Manhart, supra,* 435 U.S. at 705, 98 S.Ct. at 1373. Benefits under that plan were "funded entirely by contributions from the department, augmented by income earned on those contributions. No private insurance company was involved in the administration or payment of benefits." *Manhart, supra* at p. 705.

The Court held that this employment practice which was predicated upon sex-based actuarial tables was unlawful under Title VII.

In 1983, the Court decided *Arizona Governing Committee v. Norris, supra. Norris* involved a challenge to the lawfulness of a state's voluntary annuity plan, under which the state offered its employees the option of receiving retirement annuity benefits from one of several insurance companies selected by the state, all of which employed sex-based actuarial tables in calculating benefits, and paid women lower monthly benefits than men who made the same contributions.

The Court held such a program violated Title VII as well. Distinguishing the case from *Manhart* the Court in *Norris* stated that "since petitioners plainly would have violated Title VII if they had run the entire deferred compensation plan themselves, the only remaining question as to liability is whether their conduct is beyond the reach of the statue because it is the companies chosen by petitioners to participate in the plan that calculate and pay the retirement benefits." *Norris, supra,* 463 U.S. at 1086, 103 S.Ct. at 3499.

The Court in *Norris* concluded that the employer could not escape liability by contracting with insurance companies to provide benefits.

It is clear from the statement of the issue in *Norris*, that STRS which maintains an employer-operated plan would have been liable as of the date of *Manhart*.

This conclusion is supported by the portion of the opinion written by Justice Powell:

> "This case [*Norris*] presents no different considerations. *Manhart did put all employer operated pension funds on notice* that they could not 'require that men and women make unequal contributions to [the] fund. . . ." (emphasis added)

Justice Powell continues by outlining why the State in *Norris* might not have been put on notice by *Manhart*.

> "[*Manhart*] expressly confirmed that an employer could set aside equal contributions and let each retiree purchase whatever benefit his or her contribution could command on the 'open market' . . . given this explicit limitation, an employer reasonably could have assumed that it would be lawful to make available to the employees annuities offered by insurance companies on the open market." (*Norris, supra*, 463 U.S. at 1106, 103 S.Ct. at 3510.)

STRS being an employer operated plan was clearly on notice as of the date of *Manhart* that the use of sex-based actuarial tables in the calculation of benefits was unlawful.

Despite the clear language of the Supreme Court's decision in *Manhart* and *Norris*, the Court of Appeals erroneously found that "State Teachers' Retirement System could have assumed that it was lawful to provide an optional annuity system that reflected plans offered by insurance companies on the open market." (*Probe, supra*, 780 F.2d at 782-783).

The Court of Appeals' decision is not only analytically wrong for the reasons set forth above, but also misstates the factual record. STRS did not offer an annuity plan that *reflected plans offered by any insurance company.*

Rather, STRS offered a joint survivor retirement plan that calculated benefits based on one's years of service in the school system, age at retirement, and salary for the last three years prior to retirement. The benefits were calculated based on sex-based mortality tables. This was a plan designed by the State Legislature. The fact that STRS offered other alternative plans which did not have discriminatory effects does not shelter it from the holding in *Manhart.* The entire plan was sponsored and administered by STRS.

STRS was on notice of the unlawfulness of its plan as of the date of *Manhart,* yet to date, it continues to use sex-based actuarial tables in calculating benefits. Retroactive relief is appropriate here to force compliance with the clear dictate of the law.

The second aspect of the test for retroactivity looks to the economic impact of such relief on the plan. The issue of impact arises, as an equitable *affirmative defense* to the payment of damages. Therefore, "the party opposing retroactivity bears the burden of overcoming the presumption." *Equal Employment Opportunity Commission v. MTC Gear Corporation,* 595 F.Supp. 712, 715 (N.D.Ill. E.D. 1984); *citing NLRB v. Lyon & Ryan Ford, Inc.,* 647 F.2d 745, 757 (7th Cir. 1981); *cert. den.,* 454 U.S. 894, 102 S.Ct. 391 (1981); *Valencia v. Anderson Bros. Ford,* 617 F.2d 1278, 1288-89 (7th Cir. 1985) rev'd. on the other grounds, 452 U.S. 205, 101 S.Ct. 2266 (1981); *Kumrow v. Teamsters General Local No. 200,* 579 F.Supp. 393, 395 (E.D.Wis. 1983).

STRS cannot meet its burden of overcoming the presumption of retroactivity for an award of retroactive relief herein will not jeopardize the solvency of its plan. As the record reflects, according to plaintiff's expert Gerald D. Martin (CR 57) STRS should be accumulating funds through contributions, which are greater than the funds paid in retirement benefits. While STRS uses an assumed interest rate of 6%, its investment rate has been higher, approximately 7.4%, according to January 1, 1978 STRS' Informational Booklet. Further, STRS pays only 5.5% interest to those members withdrawing their contributions before retirement, but since STRS earns 7.4% when investing these funds, there is a profit of 1.9%. (CR 57, 61) Both of these factors lead to the conclusion that the soundness of the fund would not be harmed by an order of retroactive relief to the date of *Manhart.*

The Court of Appeals failed to even consider the financial status of the plan when denying retroactive relief. To deny retroactive relief in a blanket fashion whenever a pension plan is involved is contrary to the holdings in *Manhart* and *Norris.*

The First Circuit Court of Appeals in the case of *Spirt v. Teachers Insurance & Annuity Assn,* 735 F.2d 23 (1984) in applying *Norris* found that the Supreme Court did not intend to bar retroactivity under the facts of that case.

The First Circuit in rejecting defendant insurer's contentions that the *Norris* majority intended to bar retroactivity in all annuity cases simply because the equalization of benefits must inevitably burden someone, found no such intimation of that view in the *Norris* opinion. "Instead we see only a prohibition of relief provisions that impose added financial burdens on employers or plans." (*Spirt, supra* at 28).

The District Court herein ordered equalization of all benefits within sixty days from its order (September 14, 1981).

The Court of Appeals failed to review the District Court's decision to see if such relief was an abuse of discretion under the facts of the case. Rather, it vacated that relief based on a per se rule it adopted from *Norris*. The application of a per se rule limiting relief to equalization of benefits based on contributions paid in after the date of *Norris*, conflicts with the holding of *Manhart, Norris and Spirt*, and must be reversed by the Court. Furthermore, the impact of the adoption of a per se rule denying retroactive relief serves to limit the effectiveness of Title VII in other contexts, and must be considered by this Court.

II

THE COURT OF APPEALS MISCONSTRUED THE SUPREME COURT'S DECISION IN NORRIS BY APPLYING A PER SE RULE DENYING EQUALIZATION OF ALL PENSION PLAN BENEFITS

The issue of whether equalization of benefits is appropriate in a given case should turn on whether equalization of benefits actually constitutes retroactive relief. If it does constitute retroactive relief then the criteria set forth above for determining whether retroactive relief is proper should be applied. (See discussion, *supra* pp. 5-12.)

If equalization of benefits does not, under the facts of the case, constitute retroactive relief then there can be no basis for denying such prospective relief.

The District Court below held that STRS was required to equalize all benefits to be paid out subsequent to sixty days from the date of its decision. (September 14, 1981.)

The Court of Appeals decision is not supported by the record below nor the holding in *Norris*.

The Court of Appeals in reversing the District Court in this regard failed to analyze whether the District Court had abused its discretion in granting such relief, nor did it evaluate whether an award equalizing all post-*Manhart* benefits would be appropriate under the facts of the case. Instead, the Court of Appeals applied the conclusion of *Norris* to the case at bar without applying its reasoning. Thus it turned a balancing test which took into consideration the employees' right to compensation for past discrimination into a per se rule denying equalization of benefits in direct contradiction to Supreme Court precedent.

Indeed, the concept that prospective relief can only be obtained by equalizing benefits on contributions paid in post-*Norris* cases does not fit the realities of the STRS plan. If the STRS plan were examined by the Court of Appeals a different result would have occurred.

In *Norris*, the individual paid a sum certain to the plan and received benefits which consisted of that sum plus a return on that investment. Therefore, there was a direct correlation between the sum contributed and benefits paid out, and a prorated equalization of benefits was properly awarded to avoid the negative impact of retroactive relief.

Under the STRS plan, the teacher contributes a percentage of her salary, a sum is also contributed by the school district, the State also transfers money into the system each year. The sums transferred by the State are statutorily provided and do not correlate with the amount of money contributed by teachers in a given year. Money also comes into the system as a result of investment of plan funds. (CR 61)

The benefits paid out do not depend on the amount of an employee's past contributions. Benefits depend on years of service and final salary, age at retirement and sex. No segregated accounts are maintained for each employee.

An employee could conceivably spend years in one job, advance just prior to retirement, and collect higher monthly benefits based on his or her higher salary at retirement. Where benefit payments do not depend on the specific amount of an employee's past contributions, an award affecting that employee's future monthly benefits cannot be considered retroactive relief. The relief requires no adjustment to contributions made prior to *Manhart* because the benefit payments do not depend on the specific amounts each employee has contributed.

Similar reasoning was applied in the recent case of *Retired Public Employees Ass'n v. State of California*, 614 F.Supp. 571 (N.D.Cal. 1984) where such relief was granted.

Reversal by this Court is necessary to protect the interests of employees who suffer discrimination at the hands of a pension plan such as the Petitioners herein.

CONCLUSION

It is important that retroactive relief be made available to plaintiffs to encourage the vindication of Title VII rights so as to carry out the will of Congress. Denial of such rights herein would nullify the impact of the *Manhart* decision. It is of further importance that criteria to determine the line between retroactive relief and prospective relief be clearly articulated to enable the lower courts to carry out the mandate of *Manhart* and *Norris.*

Hence, a writ of certiorari should be issued to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit.

DATED: April 11, 1986

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals,
Ninth Circuit

JOSEPH PROBE AND DONALD SIMMONS,
et al.,
Plaintiffs/Appellees/Cross-Appellants,
v.
STATE TEACHERS' RETIREMENT SYSTEM
AND TEACHERS' RETIREMENT BOARD,
Defendants/Appellants/Cross-Appellees.

Nos. 81-5865, 81-5866.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Argued July 7, 1982.
Submitted Aug. 1, 1983.
Decided Jan. 13, 1986.

Teachers brought suit challenging, under Title VII and Equal Pay Act, state teachers' retirement system's use of sex-segregated actuarial tables in calculating benefits under its retirement plans. The United States District Court for the Central District of California, Mariana R. Pfaelzer, J., certified class and enjoined use of sex-segregated actuarial tables, ordering system to equalize pension benefits, but refusing to order full retroactive relief under Title VII. On cross appeals, the Court of Appeals, Poole, Circuit Judge, held that: (1) district court did not abuse its discretion in certifying Title VII cause of action as a class claim; (2) optional retirement plan violated Title VII on basis that an individual man might be paid lower monthly benefits simply because men as a class live a shorter time than women; and (3) award of attorney fees was not excessive.

Affirmed in part, reversed in part and remanded.

Richard D. Sommers, Robert M. Dohrman, Schwartz, Steinsapir, Dohrmann, Krepack, Sommers, & Edelstein, Los Angeles, Cal., for plaintiffs/appellees/cross-appellants.

Thomas Sheerer, Deputy Atty. Gen., Los Angeles, Cal., for defendants/appellants/cross-appellees.

Appeal from the United States District Court for the Central District of California.

Before ALARCON, POOLE, and BOOCHEVER, Circuit Judges.

POOLE, Circuit Judge:

The State Teachers' Retirement System and the Teachers' Retirement Board ["STRS"] appeal from a summary judgment in favor of plaintiffs and their class in a Title VII action, and in favor of plaintiffs Joseph Probe, Donald Simmons, and George Wing, individually, in an Equal Pay Act action. The district court, holding that STRS had violated both statutes, enjoined STRS from using sex-segregated actuarial tables in calculating benefits under its retirement plans. The court ordered STRS to equalize pension benefits for those class members who are currently retired and receiving benefits, but refused to order full retroactive relief under Title VII. The court awarded plaintiffs attorneys' fees in the amount of $66,116.25.

STRS appeals this decision and challenges the class certification and the amount of attorneys' fees awarded. Plaintiffs cross-appeal from the district court's refusal to grant retroactive relief.

I.

STRS provides retirement benefits for public school teachers in the State of California. Cal.Educ.Code §§ 22000-24944 (West 1978 & Supp.1985). Each teacher

makes contributions to STRS based upon his salary. The state and the public school districts also contribute to the fund. While membership in STRS is generally mandatory, upon retirement an employee may withdraw from STRS by removing his accumulated contributions, but then forfeits any entitlement to contributions made by the state and the school districts.

At the time this litigation was instituted, an employee remaining under STRS could choose from three alternative retirement plans. He could elect an "unmodified allowance," which is computed on the basis of highest compensation, years of service, and retirement age.[1] Under this plan, sex is not considered. A retiree electing such an unmodified allowance receives a monthly benefit until his death, at which time all payments cease. An employee could also select either of two optional plans. In each, the employee designates a beneficiary and either or both receive a monthly allowance during their lifetimes based upon the present value of the employee's unmodified allowance, discounted to account for the possibility that the beneficiary may outlive the employee.[2]

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[1]The unmodified allowance is computed by multiplying the retiree's highest final compensation by the retiree's total years of service and by an age factor. Cal.Educ.Code § 24000 (West Supp.1985). The highest final compensation is the average monthly compensation during the three highest years of compensation. Cal.Educ.Code § 22127 (West Supp.1985). For example, a 60-year retiree, whether male or female, with a highest final compensation of $2,000 per month and 32 years of service will receive a monthly retirement benefit of $1,280 computed as follows: $2,000 (highest monthly compensation) × 32 (years of service) × .02 (age factor).

[2]In Option 2, the retiree and his beneficiary are entitled to a fixed allowance for their combined lives. Cal.Educ.Code § 24200(a) (West Supp.1985). In Option 3, the retiree is entitled to an allowance until his death; if his beneficiary outlives him, the beneficiary is entitled to

To calculate the present value of the unmodified allowance, STRS must estimate the life expectancy of the retiree. In making this estimation, STRS utilizes sex-based mortality tables. STRS also utilizes these tables to determine the discount to be applied to account for the addition of the beneficiary. Because women as a group statistically outlive men, the present value of a female employee's unmodified allowance will be greater than the present value of the unmodified allowance of a similarly situated male employee. As a result, male employees electing either Option 2 or Option 3 and their beneficiaries receive a smaller allowance than similarly situated female employees and their beneficiaries.

A relevant example may be found in the hypothetical situation where a male and female retiree, both age 60 and qualifying for the same unmodified allowance, elect to designate a beneficiary under Option 2. STRS will then calculate the present value of each retiree's unmodified allowance. Because sex-based mortality tables will project a shorter life span for the male retiree, the present value of his unmodified allowance will be less than that of the female retiree. If both retirees designate a female beneficiary with an expected life span, at the date of election, of 30 years, a life span longer than that projected for both retirees, the monthly benefits to be paid the male retiree and his beneficiary will be less than those to be paid the

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one-half of the retiree's allowance during the balance of the beneficiary's lifetime. *Id.* at § 24200(b).

Currently, the state offers two additional optional plans. These plans also allow the retiree to name a beneficiary and pay out monthly benefits that are actuarially modified. In Option 4, the retiree is entitled to an allowance so long as both the retiree and the beneficiary are living; upon the death of either, the survivor is entitled to two-thirds of the retiree's allowance. *Id.* at 24200(c). Option 5 is the same as Option 4, except that the survivor is entitled to one-half of the retiree's allowance. *Id.* at § 24200(d).

female retiree and her beneficiary. This is because the present value of each retiree's unmodified allowance must be extended over the longer life span of the beneficiary. Since the male retiree has a smaller present value for his unmodified allowance, he has less benefits to extend over the estimated 30-year pay out period of the annuity plan. Thus, males equally situated with females receive lower benefits based squarely on their sex.

Plaintiffs brought this action in the district court alleging that STRS violates § 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), by administering an annuity plan that discriminates on the basis of sex. They also alleged that STRS violated the Equal Pay Act, 29 U.S.C. § 206(d), for the same reasons. Plaintiffs sought certification of a class under Federal Rule of Civil Procedure 23(b)(2) as to the Title VII claim consisting of all male certified employees "who were (since February 8, 1976), are or will be employed in positions entitling them to membership in STRS, and who are currently receiving, eligible to receive or in the future will receive or may be eligible to receive retirement benefits from STRS under Option 2 or 3 as provided in Education Code, Section 24200."

On September 8, 1980, the district court granted certification of the class as requested on the Title VII claim. On cross-motions for summary judgment, the district court held that STRS' retirement system violated Title VII. The court also granted summary judgment for plaintiffs Joseph Probe, Donald Simmons, and George Wing on their Equal Pay Act claims but dismissed the Equal Pay Act claims as to the other named plaintiffs on the ground that since they had not yet retired, the injunctive relief granted under Title VII afforded those plaintiffs the relief they requested. The court ordered STRS to equalize the retirement benefits paid to plaintiffs Probe, Simmons and

Wing and for plaintiff class members who are currently retired and receiving benefits under Option 2 or Option 3 and for those class members who thereafter retire and elect to receive retirement benefits under those options. The court also enjoined STRS from paying retirement benefits pursuant to Option 2 or Option 3 by reference to sex-based mortality tables and awarded plaintiffs $66,116.25 in attorneys' fees. We affirm in part, and reverse and remand in part.

II.

STRS argues that the district court erred in certifying the Title VII claims as a class action because (1) the motion for certification was untimely; (2) an action with both individual and class claims is confusing and unmanageable; (3) the class is ill-defined; (4) the class was improperly certified under Rule 23(b)(2) because damages were sought; and (5) there exists a danger of conflicts within the class. Class certification is a matter within the district court's discretion, and is reviewed to determine whether there has been an abuse of discretion and application of impermissible legal standards. *Hatch v. Reliance Insurance Co.*, 758 F.2d 409, 416 (9th Cir.), *cert. denied*, __ U.S. __, 106 S.Ct. 571, 88 L.Ed.2d __ (1985).

[1] STRS argues that the district court should have denied the motion for class certification as intimely because plaintiffs waited eighteen months from the filing of the original complaint before seeking class certification. *See Adise v. Mather*, 56 F.R.D. 492, 494-95 (D.Colo.1972). We conclude that the delay was unreasonable. The original complaint stated only a claim under the Equal Pay Act. The second amended complaint at issue here was filed February 7, 1980 and added the Title VII claim. Plaintiffs filed their motion for class certification on August 1, 1980. During the intervening period, STRS

filed its answer to the second amended complaint, and the plaintiffs instituted discovery to determine the number of class members. STRS does not claim that it was prejudiced by the delay. Under these circumstances, we find that the district court did not abuse its discretion in concluding that plaintiffs' request for class certification was timely.

[2] Next, STRS argues that because the action contains individual Equal Pay Act claims in addition to the Title VII class claims, it is confusing and unmanageable. The Federal Rules of Civil Procedure, however, permit actions involving both class and individual claims. Fed.R.Civ.P. 23(c)(4) ("When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues * * * *"). We note that actions involving both individuals and class claims are not uncommon. *E.g., Marshall v. Kirkland,* 602 F.2d. 1282 (8th Cir.1979); *EEOC v. General Telephone Co.,* 599 F.2d 322 (9th Cir.1979), *aff'd* 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). Since STRS does not raise any particular problems posed by the plaintiffs' pursuit of both individual and class claims, we find that the district court's decision to certify the Title VII cause of action as a class claim was not an abuse of discretion.

[3] STRS also contends that the class as defined "seems to include every male person in the world" and thus is too ill-defined to conform to Rule 23. The fact that the class includes future members does not render the class definition so vague as to preclude certification. *See* 7 C. Wright & A. Miller, Federal Practice and Procedure § 1760 at 580-81 (1972). The class here is sufficiently definite to conform to Rule 23.

[4, 5] STRS argues that this action may not proceed as a class action under Rule 23(b)(2) because plaintiffs

request damages as well as injunctive relief.[3] This argument is without merit. Class actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages. *EEOC v. General Telephone Co.*, 599 F.2d. at 334; *accord* 7A C. Wright & A. Miller, Federal Practice and Procedure § 1775 at 23-24 (1972). Although plaintiffs request money damages in this suit, such claim is merely incidental to their primary claim for injunctive relief to prohibit the use of sex-based mortality tables. Thus, plaintiffs' request for money damages does not prevent class certification under Rule 23(b)(2).

Finally, STRS argues that there exists a danger of conflict within the class.[4] STRS notes that plaintiffs are pursuing their Equal Pay Act claims individually and suggests that pursuit of these claims may arouse suspicion among the class members that the named plaintiffs are not giving adequate attention to the Title VII claim. As discussed above, however, it is not impermissible for plaintiffs to pursue both class and individual claims in the same action. That fact that plaintiffs are concurrently pursuing their individual Equal Pay Act claims does not

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[3]Rule 23(b)(2) provides:

> An action may be is maintained as as class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed.R.Civ.P. 23(b)(2).

[4]Under Rule 23 of the Federal Rules of Civil Procedure, one of the prerequisites to a class action is that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4).

automatically prevent them from adequately representing the interests of the class members.

[6] STRS also argues that there is a conflict between currently retired teachers and teachers presently working, because if the court orders higher benefits, presently working teachers will have to make larger contributions. In addition, STRS claims that it may be forced to dismantle the Option system if this court rules that use of sex-based mortality tables is unlawful, and thus male teachers who wish to provide for a beneficiary will be injured by the success of this suit. We find that neither of these considerations constitutes a "conflict" rendering certification of the class by the district court an abuse of discretion. First, we note that whether plaintiffs proceed on an individual or on a class suit basis, the requested injunctive relief they seek will generally benefit not only plaintiffs but other persons subject to the state teachers' retirement system as well. Moreover, if the state plan is found to violate Title VII, it will be invalidated notwithstanding the fact that there may be some who would prefer that it remain in operation. *See* 7 C. Wright & A. Miller, Federal Practice and Procedure § 1771 at 663-64 (1972). Thus, we conclude that the district court properly exercised its discretion in certifying the Title VII claims as a class action.

III.

Submission of this case was vacated and deferred until resolution by the United States Supreme Court of *Norris v. Arizona Governing Committee, etc., et al.*, 671 F.2d 330 (9th Cir.), *cert. granted*, 459 U.S. 904, 103 S.Ct. 205, 74 L.Ed.2d 164 (1982). The Supreme Court has since decided in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983), that

Title VII prohibits an employer from offering its employees the option of receiving, from one of several companies selected by the employer, retirement benefits which are calculated by the use of sex-based actuarial tables with the result that women receive lower monthly benefits than men who have made the same contributions. We conclude that *Norris* controls this case, and we find that the optional retirement plan administered by STRS also violates Title VII.

Title VII makes it an unlawful employment practice "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

In *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), the Supreme Court held that Title VII was directed toward discrimination against individuals, not classes, and found that even though women as a class statistically outlive men, an employer could not require larger pension fund contributions from female employees in order for them to be entitled to the same monthly benefits as male employees upon retirement. In *Norris,* the Court further held that the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage. 463 U.S. at 1081, 103 S.Ct. at 3496 (Marshall, J., concurring in the judgment in part). This is because Title VII does not permit an employer to classify employees on the basis of sex in predicting their longevity. *Id.* at 1083, 103 S.Ct. at 3497. "The use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class, for under the statute '[e]ven a true generalization about [a] class' cannot justify class-based

treatment." *Id.* at 1084, 103 S.Ct. at 3498 (quoting *Manhart,* 435 U.S. at 708, 98 S.Ct. at 1375) (footnote omitted).

[7] We find that the plan administered by STRS, like the plan in *Norris,* impermissibly discriminates on the basis of sex because a man and a woman who retire with the same unmodified monthly allowance and who choose to participate in either the Option 2 or Option 3 plan, naming identical beneficiaries, will not receive identical monthly benefits. An individual man may not be paid lower monthly benefits simply because men as a class live a shorter time than women. *See Norris,* 463 U.S. at 1085, 103 S.Ct. at 3499.

Furthermore, the fact that STRS provides equal benefits to both men and women selecting the unmodified allowance does not insulate the plan from attack under Title VII. "An employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis." *Id.* at 1082 n. 10, 103 S.Ct. at 3497 n. 10. The plan also is not saved by the fact that the monthly benefits under the options are based on the nondiscriminatory unmodified allowance. It is the calculation of the present discounted value of that allowance in a sexually discriminatory manner that is illegal under *Norris.*

Finally, it is irrelevant that the employees under STRS are free to withdraw their accumulated contributions from the fund and invest those contributions in any way they wish.[5] Title VII applies to both mandatory and voluntary pension plans. *Id.* at 1081 n. 10, 103 S.Ct. at 3497 n. 10.

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[5]We note that this is not a very realistic option since an employee may withdraw only his own contributions and not those made by the state and the school districts.

Although we affirm the district court's holding that the plan administered by STRS violates Title VII, we must decide whether the relief ordered by the district court is proper. The court enjoined STRS from paying further retirement benefits pursuant to Option 2 or Option 3 by reference to sex-based actuarial tables. Because these annuity payments are funded by past contributions from the employee, state, and school districts, the relief ordered here, affecting all benefit payments made after the district court's judgment, is fundamentally retroactive in nature. *See Norris,* 463 U.S. at 1092, 103 S.Ct. at 3502 (Marshall, J., concurring in the judgment in part); *id.* at 1105 n. 10, 103 S.Ct. at 3510 n. 10 (Powell, J., concurring in part).

[8, 9] We begin our analysis by recognizing that once a violation of Title VII is found, retroactive relief "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975) (footnote omitted). However, the Supreme Court has made clear that such retroactive relief is not automatic when an employer-sponsored pension program is held to violate Title VII. *See Norris,* 463 U.S. at 1075, 103 S.Ct. at 3494 (per curiam); *Manhart,* 435 U.S. at 719, 98 S.Ct. at 1380. As Justice Powell, who wrote the majority opinion in *Norris* on the issue of relief, pointed out, "[t]he business of underwriting insurance and life annuities requires careful approximation of risk. * * * Should an unforeseen contingency occur, such as a drastic change in the legal rules governing pension and insurance funds, both the insurer's solvency and the insured's benefits could be jeopardized." 463 U.S. at 1106, 103 S.Ct. at 3510 (citing *Manhart,* 435 U.S. at 721, 98 S.Ct. at 1382).

Accordingly, retroactive relief will be denied when an employer was not on notice by prior judicial decisions that its pension program was unlawful. *See id.; Manhart*, 435 U.S. at 720-21, 98 S.Ct. at 1381-82.

[10] While *Manhart* put all employer-operated pension funds on notice that they could not require men and women to make unequal contributions to the fund, it expressly held that an employer could set aside equal contributions and let each retiree purchase whatever benefit is available on the "open market." 435 U.S. at 717-18, 98 S.Ct. at 1380. Thus, STRS reasonably could have assumed that it was lawful to provide an optional annuity system that reflected plans offered by insurance companies on the open market. Under these circumstances, we conclude that full retroactive relief is not appropriate.

These circumstances, however, changed once the Supreme Court decided *Norris*. That case clearly put employer-operated pension funds on notice that they could not determine monthly retirement benefits by reference to sex-segregated mortality tables. Once on notice, an employer could reassess its risk and restructure its pension fund for future contributions so as to comply with the mandate in *Norris*. On this basis, we hold that benefits derived from contributions made prior to the Supreme Court's decision in *Norris* may be calculated as provided by the existing terms of the STRS plan. However, any benefits derived from contributions made after that decision must be recalculated without regard to the sex of the retiree. Accordingly, the district court's judgment on the Title VII issue is affirmed in part, reversed in part, and remanded.

IV.

The named plaintiffs also brought individual actions against STRS claiming that the use of sex-segregated

mortality tables in calculating benefits to be paid under Option 2 and Option 3 violates the Equal Pay Act, 29 U.S.C. § 206(d)(1). Plaintiffs Probe, Simmons and Wing prevailed on their claims; however, the district court refused to grant relief as to the other named plaintiffs since these plaintiffs had not yet retired and therefore were not entitled to damages under the Act. These plaintiffs do not appeal the district court's denial of their Equal Pay Act claims. Thus, only that part of the district court's judgment with respect to plaintiffs Probe, Simmons, and Wing is before us on appeal.

The Equal Pay Act prohibits an employer subject to its provisions from discriminating on the basis of sex in the payment of wages. *Spaulding v. University of Washington*, 740 F.2d 686, 696 (9th Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984). While the Supreme Court has held that pension benefits are "compensation" under Title VII, it has declined to decide whether retirement benefits constitute "wages" under the Equal Pay Act. *Norris*, 463 U.S. at 1080 n. 8, 103 S.Ct. at 3496 n. 8 (Marshall, J., concurring in the judgment in part); *Manhart*, 435 U.S. at 712 n. 23, 98 S.Ct. at 1377 n. 23. We also need not decide this issue since, assuming we were to find that the STRS retirement plan violates the Equal Pay Act, the retroactivity analysis of *Norris* and *Manhart* would preclude awarding relief to plaintiffs Probe, Simmons, and Wing since each was already retired when they brought their claims.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-109, 92 S.Ct. 349, 354-356, 30 L.Ed.2d 296 (1971), the Supreme Court set forth three criteria for determining when to apply a judicial decision of statutory interpretation pro-

spectively.[6] We find that all three criteria would preclude giving retroactive effect to a decision that the plan at issue violates the Equal Pay Act. First, such a decision would establish a new principle of law which was not clearly foreshadowed. As previously stated, no court has yet decided whether pension benefits constitute wages under the Equal Pay Act.

Second, we believe that while retroactive application of such a ruling would not retard the purposes of the Equal Pay Act, the Act's goal of ensuring equal pay for equal work would not require retroactivity. Following the reasoning of one member of the *Norris* Court, we "see no reason to believe that a retroactive holding [would be] necessary to ensure that pension plan administrators, who may have thought until [a] decision today that [the Equal Pay Act] did not extend to [pension] plans * *, [would] not * * * quickly conform their plans to ensure that individual employees are allowed equal monthly benefits regardless of sex." 463 U.S. at 1110, 103 S.Ct. at 3512 (O'Conner, J., concurring).

Most importantly, the last criterion — whether retroactive application would impose inequitable results — would require that such a decision be applied prospectively. If employees who retired prior to the Supreme Court's decision in *Norris* could sue to have their annuity payments increased under the Equal Pay Act, then the Supreme Court's limitation on retroactivity imposed in *Manhart* and *Norris* would be circumvented and employer-

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[6]Under the three-part test, a court should consider (1) whether the decision established a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether retroactive effect of the decision would further or retard the operation of the statute; and (3) whether retroactive application would impose an equitable result. *Chevron Oil Co.*, 404 U.S. at 106-107, 92 S.Ct. at 355.

operated pension funds would face potentially devastating financial pressures. This real danger of bankrupting pension funds would preclude giving retroactive effect to a decision that the plan at issue violates the Equal Pay Act.

In view of our decision on the Title VII class action and given the Supreme Court's holding in *Norris* that relief should be given only as to pension fund contributions made subsequent to the date of that opinion, a decision at this time on whether a violation of the Equal Pay Act is stated in this case is unwarranted, and we decline to reach it. We note that class-wide relief has been afforded by Title VII since those class members retiring after July 6, 1983 will receive benefits calculated pursuant to *Norris*. Accordingly, we reverse the district court's judgment in favor of plaintiffs Probe, Simmons, and Wing on their Equal Pay Act claims.

V.

The district court awarded plaintiffs $66,116.25 in attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k) (1982). STRS argues that the amount of attorneys' fees awarded is excessive because (1) the district court did not take into account duplication of effort, (2) plaintiffs prevailed against only one of the six original defendants, (3) plaintiffs' "victory" hurts female employees more than it helps male employees, and (4) some of the plaintiffs' expenses are unrelated to the lawsuit. We review the district court's determination of the amount of attorneys' fees for an abuse of discretion. *Optyl Eyewear Fashion International Corp. v. Style Companies*, 760 F.2d 1045, 1048 (8th Cir.1985); *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378; 1384 (9th Cir.1984).

Initially, we observe that the fee amount awarded by the district court was apparently based on a stipulation between the parties that

> the table set forth below reflects the attorneys' fees to be awarded plaintiffs' counsel in accordance with the Court's decision announced March 16, 1981. The hours listed below include all hours expended by plaintiffs' counsel through and including March 16, 1981.
>
> | | |
> |---|---|
> | Partners' hours ..... (247 hours at $175/hour) | $43,225.00 |
> | Senior Associates' hours ..... (129.25 hours at $125/hour) | 16,156.25 |
> | Junior Associates' hours ..... (112.25 hours at $60/hour) | 6,735.00 |
> | TOTAL ..... | $66,116.25 |

The stipulation was signed by both parties and by the district judge. If the document is in fact a stipulation, STRS would be barred from challenging the amount awarded. However, the district court's decision awarding fees makes no reference to the stipulation and instead appears to review independently the fee request. In addition, plaintiffs do not raise the stipulation as a bar to STRS' appeal of this issue. Under these circumstances, we find it unnecessary to characterize the document as a binding stipulation and choose to review the fee award.

[11] In determining the amount of fees to be awarded, a district court is to consider the guidelines set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.1975), *cert. denied*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). Here, the district court did not explicitly apply these factors, but did examine the following considerations: "[T]he reasonable hours expended by

counsel, the reasonable hourly rate prevailing in the community for similar legal services, the contingent nature of success, including the delayed receipt of payment for the services rendered, the quality of representation, and the results obtained." Although we do not sanction the district court's failure to explicitly set forth its consideration of the *Kerr* factors, we believe that the court's decision, which sets forth a consideration of the most relevant factors, is sufficiently detailed for meaningful review on appeal. *See Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 838-39 (9th Cir.1982); *Harmon v. San Diego County*, 664 F.2d 770, 772 (9th Cir.1982) (as amended). Thus, we now turn to STRS' specific contentions.

[12] STRS contends that plaintiffs' counsel incurred unnecessary litigation expense by assigning more than one attorney to the case, and in sending more than one attorney to some of the hearings. Hours that are excessive, redundant, or otherwise unnecessary are to be excluded when calculating a reasonable attorneys' fee. *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1939, 78 L.Ed.2d 40 (1983); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1027 (9th Cir.1985) (as amended).[7] However, in an important class action litigation such as this, the participation of more than one attorney does not constitute an unnecessary duplication of effort.

[13, 14] STRS argues that because the action was dismissed as to five of the six original defendants; plaintiffs were not entitled to recover the entire amount of their litigation expenses. We disagree. The extent of a

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[7]Although *Hensley* dealt with an award of attorneys' fees under 42 U.S.C. § 1988, the Court specifically held that the standards set forth in its opinion were generally applicable "in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" 461 U.S. at 433 n. 7, 103 S.Ct. at 1939 n. 7.

plaintiff's success is a crucial factor in determining the proper amount of fees to be awarded. *Hensley*, 461 U.S. at 440, 103 S.Ct. at 1943; *Transgo, Inc.*, 768 F.2d at 1027. Despite the release of the other defendants, plaintiffs achieved the major relief they sought in this case — a court decision preventing STRS from using sex-segregated mortality tables in calculating pension benefits. "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Hensley*, 461 U.S. at 440, 103 S.Ct at 1943. Because plaintiffs obtained substantial class-wide relief on their Title VII claim, no reduction of fees is warranted.

STRS also argues that the result plaintiffs will obtain if they ultimately prevail does not justify the amount of attorneys' fees awarded because STRS may then delete the option system, thereby harming all employees, or STRS may convert to sex-neutral mortality tables which will make the options unattractive to female retirees. We find STRS' first contention speculative. Our decision today does not mandate eradication of the option system. As to the second contention, the fact that adoption of sex-neutral mortality tables may result in the future in lower monthly retirement benefits being paid to women electing one of the optional plans is irrelevant to the issue whether plaintiffs have sufficiently prevailed to merit a full fee award. If the benefits paid to women have to be reduced as a result of our decision today, it is only because their prior calculation was done in a manner so as to violate Title VII.

Finally, STRS contends that some of the plaintiffs' requested fees should have been excluded because they were unrelated to the litigation. The district court, however, implicitly found against STRS on this issue, and we

conclude that this finding is not clearly erroneous. Therefore, that part of the district court's judgment awarding attornyes' fees is affirmed.

VI.

The judgment of the district court is AFFIRMED IN PART, REVERSED IN PART and REMANDED for proceedings consistent with this opinion. Plaintiffs, having prevailed on appeal, are entitled to attorneys' fees which the district court is requested to determine according to law.

APPENDIX B

Opinion of the
United States District Court
for the Central District of California

PROBE v. STATE TEACHERS' RETIREMENT SYSTEM

U.S. DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA

PROBE, et al.

v.

STATE TEACHERS' RETIREMENT SYSTEM and
TEACHERS' RETIREMENT BOARD,
No. CV 79-522 MRP,
September 14, 1981

PFAELZER, District Judge: — Plaintiffs' and defendants' cross-motions for summary judgment came on for hearing January 26, 1981. The Court, after reading and considering the memoranda and affidavits submitted by the parties and hearing oral arguments, grants plaintiffs' motion for summary judgment and denies defendants' motion for summary judgment under Title VII. Under the Equal Pay Act, the Court grants plaintiffs' motion for summary judgment for plaintiffs Probe, Simmons and Wing, current retirants, and dismisses the action for all other named plaintiffs. The Court denies defendants' motion for summary judgment under the Equal Pay Act.

FINDINGS OF FACT

1. Plaintiff Joseph Probe, from September 1961 until his retirement in June 1978, was a certificated employee employed by the Fallbrook Union High School district in Fallbrook, California. From September 1959 until June 1961, he was a certificated employee employed by the Fallbrook Union Elementary School District of Fallbrook, California. Mr. Probe was a member of the State Teachers' Retirement System ("STRS") and is now receiving approximately $525.00 in monthly retirement benefits under STRS Option 2 as provided in California Education Code § 24200. He is a male, married, and currently resides in the City of North Bend, State of Oregon.

2. Plaintiff Donald Simmons, from September 1960 until his retirement in June 1978, was a certificated employee employed by the Fallbrook Union High School District in Fallbrook, California. From September 1957 until June 1960, he was a certificated employee employed by the Garden Grove Union High School District in Garden Grove, California. Mr. Simmons was a member of STRS and is now receiving approximately $601.00 in monthly retirement benefits under STRS Option 2 as provided in California Education Code § 24200. He is a male, married, and currently resides in the County of San Diego, State of California.

3. Plaintiff George Wing, from September 9, 1957, until his retirement in June 1977, was a certificated employee employed by the Centinela Valley Union High School district in Hawthorne, California. Mr. Wing was a member of STRS and is now receiving approximately $502.99 in monthly retirement benefits under STRS Option 2 as provided in California Education code § 24200. He is a male, married, and currently resides in the County of Los Angeles, State of California.

4. Plaintiff Garth Belknap is currently, and since September 1949 has been, a certificated employee of the Torrance Unified School District in Torrance, California. Mr. Belknap is 66 years of age, a male, married, and resides in the County of Los Angeles, State of California. He is, and since September 1949 has been, a member of STRS. He is currently eligible to retire and receive benefits from STRS. While he has not filed a Pre-retirement Option form, Mr. Belknap presently intends to elect to receive, at the time of his retirement, benefits under STRS Option 2 or Option 3, as provided in California Education Code § 24200.

5. Plaintiff Robert Danbom is currently, and since January 1955 has been, a certificated employee of the Los Angeles Unified School District in Los Angeles, California. Mr. Danbom is 56 years of age, a male, married, and resides in the County of Los Angeles, State of California. He is, and since January 1955 has been, a member of STRS. He is, currently eligible to retire and receive benefits from STRS. While he has not filed a Pre-retirement Option form, Mr. Danbom presently intends to elect to receive, at the time of his retirement, benefits under STRS Option 2 or Option 3, as provided in California Education Code § 24200.

6. Plaintiff Harry Vix is currently, and since September 1950 has been, a certificated employee of the Fallbrook Union High School District in Fallbrook, California. From September 1945 until June 1950, he was a certificated employee employed by the Corcoran Union High School District in Corcoran, California. Mr. Vix is 59 years of age, a male, married, and resides in the County of San Diego, State of California. He is, and since September 1945 has been, a member of the STRS and is currently eligible to retire and receive benefits from STRS. While he has not filed a Pre-retirement Option

form, Mr. Vix presently intends to elect to receive, at the time of his retirement, benefits under STRS Option 2 as provided in California Education Code § 24200.

7. Plaintiff William Bayer is currently, and since September 1967 has been, a certificated employee of the Rio Hondo Community College District in Whittier, California. He is, and since September 1969, has been a member of STRS. Mr. Bayer is 48 years of age and will be eligible to receive retirement benefits from STRS in 1986, provided he continues to meet all eligibility requirements. He presently intends to elect to receive, at the time of his retirement, benefits under STRS Options 2 or 3 as provided in California Education Code § 24200. Mr. Bayer is a male, married, and resides in the County of Los Angeles, State of California.

8. Plaintiff Bert Davis is currently, and since September 1970 has been, a certificated employee of the Rio Hondo Community College District in Whittier, California. He is, and since September 1970 has been, a member of STRS. Mr. Davis is 39 years of age and will be eligible to receive retirement benefits from STRS in 1994, provided he continues to meet all eligibility requirements. He presently intends to elect to receive, at the time of his retirement, benefits under STRS Options 2 or 3 as provided in California Education Code § 24200. Mr. Davis is a male, married, and resides in the County of Los Angeles, State of California.

9. Plaintiff Robert Ray is currently, and since at least September 1964 has been, a certificated employee of the Torrance Unified School District in Torrance, California. He is, and since September 1964 has been, a member of STRS. Mr. Ray is 39 years of age and will be eligible to receive retirement benefits from STRS in 1986, provided he continues to meet all eligibility requirements. He presently intends to elect to receive, at the time of his

retirement, benefits under STRS Options 2 or 3 as provides in California Education Code § 24200. Mr. Ray is a male, married, and resides in the County of Los Angeles, State of California.

10. Defendant STRS, pursuant to California Education Code § 22000 et seq., is the duly constituted and acting agency charged by law with administering STRS retirement funds.

11. Defendant Teachers' Retirement Board ("Board"), pursuant to California Education Code § 22000 et seq., is invested with the responsibility and authority for managing STRS. The Board has exclusive control and administration of all STRS funds and has the sole power and authority to hear and determine all facts pertaining to the administration of STRS. California Education Code § 22202.

12. STRS is a unit of State and Consumer Services Agency of the State of California. The purposes of STRS are set forth in California Education Code § 22001, and it functions as a unit of the State Government within the Executive Branch of said government. The authority of the Teachers' Retirement Board to administer the STRS is established in California Education Code § 22209.

13. The following relates to the funding of STRS: Employers, whose employees are members of STRS, make contributions to STRS as provided by law. These contributions are placed in a special trust fund known as the Teachers' Retirement Fund from which retirement benefits are drawn. Warrants are issued by the State Controller and paid by the State Treasurer. The employer contributions are not credited to any individual's account. The amount of the employer contributions is fixed by statute and is not subject to negotiation under collective

bargaining as are all other forms of compensation to school certificated employees.

14. The State of California contributes to the Teachers' Retirement Fund. As of 1979, the State's General Fund appropriates some $144.3 million per year for the Teachers' Retirement Fund. That figure did increase substantially on July 1, 1980 (California Education Code § 23402) and will continue to increase each year.

15. The contributions from the employers and from the State General Fund are used to pay the current monthly allowance roll. None of these payments are accumulated in reserves for the future payment of retirement benefits.

16. Employee (member) contributions are also fixed by statute. They are identical for male and female members provided that they have the same salary.

17. Retirememt benefits are payable to certificated employees who retire at age 55 or later and who have at least five years credited services as defined in the California Education Code. Retirement benefits are established by statute, and they are only payable to STRS members who meet the minimum retirement qualifications.

18. Unmodified retirement benefits are paid by STRS pursuant to California Education Code § 24000 which provides:

> Upon retirement for service which became effective after June 30, 1972, a member shall receive a retirement allowance which shall consist of:
>
> (a) An annual allowance payable in monthly installments, upon retirement at age 60 or over, equal to 2 percent of the final compensation for each year of credited service. If the retirement of a member is effective at less than age 60 and be-

tween the ages of 55 and 60 this allowance shall be reduced by one-half of 1 percent for each full month, or fraction of a month which will elapse until the member would have reached age 60, and

(b) An annuity which shall be the actuarial equivalent of the accumulated annuity deposit contributions standing to the credit of his account at the time of his retirement.

A school district or other employing agency may elect to permit all members with 30 years of credited service to retire at age 50 or older and receive an annual allowance equal to 2 percent of final compensation for each year of credited service. If the member is over age 50, but under age 55, the allowance shall be reduced by one-quarter of 1 percent for each full month or fraction of a month which will elapse until the member would have reached age 55 and one-half of 1 percent for each full month, or fraction between 55 and 60.

In computing the above amounts, the age of the member at the last day of the month in which the retirement allowance begins to accrue or such later date as provided in Section 23900 shall be used.

19. No interest rate, actuarial or otherwise, is used in determining the STRS retirement factor of 2.0% at age 60. It is set by California Education Code § 24000.

20. The monthly unmodified allowance payable to a man and woman will be exactly equal if they retire as of the same day with their ages, service credits and final compensations being exactly identical.

21. Two options exist in the STRS plan in the form of a joint and survivor annuity.

22. These options are described as follows in California Education Code § 24200:

> Any member prior to the effective date of the member's retirement may elect an option which is an actuarially reduced retirement allowance payable throughout the life of the member and his designated beneficiary as follows:
>
> (a) Option 2. Upon the retirant's death, the reduced retirement allowance equal to the amount the retirant was receiving shall be paid to such person as the retirant has nominated by written designation duly executed and filed with the system at the time of his retirement; or
>
> (b) Option 3. Upon the retirant's death, one-half of the reduced retirement allowance the retirant was receiving shall be paid to such person as the retirant has nominated by written designation duly executed and filed with the system at the time of his retirement.
>
> A member may revoke or change his election of an option at any time prior to the effective date of the member's retirement.

23. The optional reduction percentages are computed to produce a modified joint and survivor allowance with the same present value as the retirant's unmodified allowance. It makes no difference to STRS whether any or all of the retirants elect an option because the option calculation takes the present value of the retirant's lifetime allowance and spreads it over the joint life expectancy of the retirant and the named beneficiary. For the period July 1, 1975 through June 30, 1979, approximately thirty percent (30%) of STRS members chose one of the options. Men chose one of them 52% of the time, and women chose one of them 17% of the time.

24. The current joint and survivor option percentages are based on the 1965 Group Annuity mortality tables and 6.0% interest and were adopted as of January 1, 1974. They are separately maintained for males and females. The previous factors, adopted as of July 1, 1962, were based on STRS mortality tables and 4.00% interest.

25. The present value factors are computed from the male or female mortality table and assumed interest rates and are related to life expectancy because they are based on the mortality tables. The present value factors currently used by STRS are based on 1965 Group Annuity Mortality tables and 6.0% interest — the same as the joint and survivor percentages — and were adopted as of January 1, 1974.

26. The foregoing calculations result in male retirants receiving a lower monthly benefit both for themselves and their beneficiaries than that received by similarly situated females and their beneficiaries because the mortality tables used produce a lower present value for males than females since they assume that females as a class will live longer than males as a class. Thus, plaintiff, Joseph Probe, elected STRS Option 2 and receives $525.70 per month in retirement benefits. A female retirant, the same age as Probe, with identical years of service, identical highest compensation, and a male beneficiary the same age as Probe's female beneficiary, selecting STRS Option 2 would receive $591.70 per month in retirement benefits. Plaintiff, Donald Simmons, elected STRS Option 2 and receives $601.56 per month in retirement benefits. A female retirant, the same age as Simmons, with identical years of service, identical highest compensation, and a male beneficiary the same age as Simmons' female beneficiary, selecting STRS Option 2 would receive $671.35 per month in retirement benefits.

27. Plaintiffs timely filed charges of employment discrimination with the Equal Employment Opportunity Commission ("EEOC") on February 6, 1979. Plaintiffs alleged that defendants' practices as described above discriminated against them and the class they represent because of their male sex.

28. Plaintiffs' charges of discrimination were referred to the State Department of Industrial Relations, Division of Fair Employment Practices ("FEPC") in Los Angeles, California. The FEPC, under § 706(c) of Title VII (42 U.S.C. § 2000e-5(c)) is the appropriate State Agency to consider plaintiffs' charges. Sometime thereafter, the EEOC assumed jurisdiction over plaintiffs' charges.

29. On September 14, 1979, the United States Department of Justice issued to each plaintiff a "Notice of Right to Sue" letter. This notice entitles plaintiffs to institute a civil action in an appropriate federal court within 90 days of receipt of the notice against, among others, STRS and the Board.

30. The plaintiffs employed legal counsel, who rendered valuable services to the class in the litigation of the issues presented in this case.

31. Counsel for the plaintiff class reasonably expended a total of 488.50 hours, including the hours spent pursuing an award of attorneys' fees. The hours spent by each class of attorney involved in this matter, are as follows:

Partner	247
Senior Associate	129.25
Junior Associate	112.25

The reasonable hourly rates prevailing in the Los Angeles community for work similar to that involved in this litigation are as follows:

Partners' Hourly Rate	$175.00
Senior Associates' Hourly Rate	125.00
Junior Associates' Hourly Rate	60.00

32. Counsel for the plaintiffs assumed the risk that the litigation in this case would not be successful. The receipt of any fees by counsel for the plaintiffs has been delayed since the Complaint was filed on February 8, 1979.

33. Counsel for the plaintiffs performed the services rendered with a skill above that normally expected for attorneys receiving the hourly rates prevailing in the Los Angeles community.

34. This suit permitted the plaintiffs to obtain a result which they might not otherwise have been able to achieve.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action under § 706 of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-5), § 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 216(b)), 28 U.S.C. § 1331, and 28 U.S.C. § 1343. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. Venue is proper in this district under 28 U.S.C. §§ 1391 and 1392 in that the unlawful employment practices alleged herein were and are being committed throughout the State of California, including the Central District of the State of California, and defendant STRS maintains an office and does business in this district.

3. The plaintiffs filed timely charges with the EEOC. After receiving a "Notice of Right to Sue" letter from the United States Department of Justice, the plaintiffs filed a

timely complaint with this Court. The plaintiffs have satisfied the jurisdictional prerequisites of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e et seq.).

4. STRS and the Teachers' Retirement Board are employers within the meaning of § 701(b) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(b), and within the meaning of § 3(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 203(d).

5. With respect to the cause of action founded upon the Equal Pay Act of 1963, 29 U.S.C. § 206(d), the claims against the school districts employing the named plaintiffs, and the claims against Kenneth Cory, State Controller of California, and Jesse Unruh, State Treasurer of California, were dismissed for failure to state a claim upon which relief could be granted by Order of the Court dated May 19, 1980.

6. With respect to the cause of action founded upon the Equal Pay Act of 1963, 29 U.S.C. § 206(d), and with respect to the cause of action founded upon §§ 703(a)(1) and (2) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a)(1) and (2), this matter is properly maintained against defendants STRS and the Teachers' Retirement Board.

7. With respect to the cause of action founded upon §§ 703(a)(1) and (2) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a)(1) and (2), this matter has been certified by Order of the Court dated September 8, 1980 as a class action with the following represented class:

> All male certificated employees who were since February 8, 1976, are or will be employed in positions entitling them to membership in STRS, and who are

currently receiving, eligible to receive or in the future will receive or may be eligible to receive retirement benefits from STRS under Option 2 or 3 as provided in California Education Code § 24200.

8. With respect to the cause of action founded upon the Equal Pay Act of 1963, 29 U.S.C. § 206(d), this matter, by Order of the Court dated May 19, 1980, is brought on behalf of the named plaintiffs only.

[1] 9. The payment of lesser monthly retirement benefits to male employees selecting STRS Option 2 or Option 3 than to their female counterparts is an unlawful employment practice within the meaning of §§ 703(a)(1) and (2) of the Act, 42 U.S.C. §§ 2000e-2(a)(1) and (2), and no defenses under § 703(h) of the Act have been stated, 42 U.S.C. § 2000e-2(h). City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702, 17 FEP Cases 395 (1978); Equal Employment Opportunity Commission v. Colby College, 589 F.2d 1139, 18 FEP Cases 1125 (1st Cir. 1978); Norris v. Arizona Committee, 486 F. Supp. 645, 22 FEP Cases 1059 (D. Ariz. 1980).

[2] 10. The retirement benefits paid to male and female employees pursuant to STRS Option 2 and Option 3 as set forth in California Education Code § 24200 constitute wages within the meaning of the Equal Pay Act of 1963, 29 U.S.C. § 206(d).

11. The payment of lesser monthly retirement benefits to plaintiffs, Joseph Probe, Donald Simmons, and George Wing, than to their female counterparts, constitutes discrimination in the payment of wages on the basis of sex in violation of the Equal Pay Act, 29 U.S.C. § 206(d), and no defenses under that Act have been stated. Judgment should be entered for these plaintiffs under the Equal Pay Act, 29 U.S.C. § 206(d), because they currently receive retirement benefits under STRS Option 2. Judgment

should not be entered for the other named plaintiffs under the Equal Pay Act, 29 U.S.C. § 206(d), because the injunctive relief granted under Title VII, 42 U.S.C. § 2000e et seq., affords the relief requested.

[3] 12. Defendants shall be ordered to equalize the retirement benefits paid pursuant to STRS Option 2 for plaintiffs Probe, Simmons, and Wing, and for plaintiff class members who are currently retired and receiving benefits pursuant to STRS Option 2 or Option 3 and who thereafter retire and elect to receive retirement benefits under STRS Option 2 or Option 3, within sixty days of the entry of judgment. Defendants shall be ordered to equalize the retirement benefits paid pursuant to STRS Option 2 and Option 3 for all future male retirees.

13. Defendants shall not be ordered to retroactively compensate plaintiffs Probe, Simmons, and Wing, and plaintiff class members who are currently retired and receiving retirement benefits pursuant to STRS Option 2 or Option 3. Manhart, supra, 435 U.S. 702, 721, 17 FEP Cases 395.

14. Counsel for the plaintiffs are entitled under § 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), to reasonable attorneys' fees.

[4] 15. The factors to be considered in computing an award of attorneys' fees include the reasonable hours expended by counsel, the reasonable hourly rate prevailing in the community for similar legal services, the contingent nature of success, including the delayed receipt of payment for the services rendered, the quality of representation, and the results obtained. Copeland v. Marshall, No. 77-1351, 641 F.2d 880, 23 FEP Cases 967 (D.C. Cir. 1980); Lockheed Minority Solidarity Coalition v. Lock-

heed Missile and Space Company, 406 F.Supp. 828, 20 FEP Cases 677 (N.D.Cal. 1976).

16. In determining the amount of attorneys' fees to be awarded, it is not relevant that the defendants, STRS and the Teachers' Retirement Board are state agencies. Copeland v. Marshall, supra, 23 FEP Cases at 977-978.

17. Plaintiffs' counsel are entitled to receive attorneys' fees for the hours expended pursuing relief under the Equal Pay Act of 1963, 29 U.S.C. § 206(d), and for the hours expended pursuing retroactive compensation for plaintiffs Probe, Simmons, and Wing and for those class members currently retired and receiving benefits under STRS Option 2 or Option 3.

18. Plaintiffs' counsel are entitled to receive attorneys' fees for the hours expended seeking an award of attorneys' fees.

19. The total award of attorneys' fees to plaintiffs' counsel is $66,116.25.

20. Plaintiffs are entitled under § 706(d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), to their costs of suit herein.

Order and Judgment

This action came on for hearing before the Court, the Honorable Mariana R. Pfaelzer, District Judge, presiding, on Plaintiffs' and Defendants' Cross-Motions for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the issues having been duly heard, and Findings of Fact and Conclusions of Law having been duly rendered, it is hereby

ORDERED, that Plaintiffs' Motion for Summary Judgment with respect to the cause of action brought pursuant

to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., is granted, and it is further

ORDERED, that Plaintiffs' Motion for Summary Judgment with respect to the cause of action pursuant to the Equal Pay Act, 29 U.S.C. § 206(d), is granted for Plaintiffs Joseph Probe, Donald Simmons and George Wing, and it is further

ORDERED, that Plaintiffs' action pursuant to the Equal Pay Act, 29 U.S.C. § 209(d), is dismissed with respect to Plaintiffs Robert Danbom, Harry Vix, William Bayer, Bert Davis, Garth Belknap and Robert Ray, and it is further

ORDERED, that Defendants' Motion for Summary Judgment is in all respects denied, and it is further

ORDERED, ADJUDGED, AND DECREED, that Plaintiffs' counsel shall be awarded attorneys' fees, pursuant to § 706(k) of Title VII, U.S.C. § 2000e-5(k), in the amount of $66,116.25, to be paid by Defendants, and it is further

ORDERED, ADJUDGED, AND DECREED, that Plaintiffs shall be awarded, pursuant to § 706(k) of Title VII, 42 U.S.C. § 2000e-5(k) their costs of suit herein, and it is further

ORDERED, ADJUDGED, AND DECREED, that within sixty (60) days of the entry of the judgment herein, Defendants shall equalize the retirement benefits paid pursuant to STRS Option 2 for Plaintiffs Probe, Simmons and Wing and for Plaintiff class members who are currently retired and receiving benefits pursuant to STRS Option 2 or Option 3 and class members who thereafter retire and elect to receive retirement benefits pursuant to STRS Option 2 and Option 3, and it is further

ORDERED, ADJUDGED, AND DECREED, that Defendants are to equalize retirement benefits paid to all future male retirees pursuant to STRS Option 2 and Option 3 and are enjoined from paying such retirement benefits by reference to mortality tables based solely on sex.

APPENDIX C

CALIFORNIA EDUCATION CODE

§ 24200. Options

Any member prior to * * * the effective date of the member's retirement * * * may elect an option which is an actuarially reduced retirement allowance payable throughout the life of the member and his designated beneficiary as follows:

(a) Option 2. Upon the retirant's death, the reduced retirement allowance equal to the reduced amount the retirant was receiving shall be paid to such person as the retirant has nominated by written designation duly executed and filed with the system at the time of his retirement; or

(b) Option 3. Upon the retirant's death, one-half of the reduced retirement allowance the retirant was receiving shall be paid to such person as the retirant has nominated by written designation duly executed and filed with the system at the time of his retirement.

A member may revoke or change his election of an option at any time prior to the * * * effective date of the member's retirement.

(Amended by Stats.1978, c. 277, p. 564, § 2.)

1978 Amendment. Substituted the election, revocation or change of an option prior to the effective date of the members retirement for election, revocation or change of an option prior to mailing of the first retirement allowance check.

Asterisks * * * indicate deletions by amendment.

Underline indicates changes or additions by amendment.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On April 11, 1986, I served the within Petition for Writ of Certiorari in re: "Joseph Probe and Donald Simmons v State Teachers' Retirement System & Teachers Retirement Board in the United States Supreme Court, October Term, 1985 No. .....;

on the Parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Attorney for Respondents
THOMAS SCHEERER, Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010

THE HONORABLE MARIANA R. PFAELZER
312 N. Spring St.
Los Angeles, California 90012

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on April 11, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Supreme Court, U.S.
FILED
MAY 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1665

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOSEPH PROBE and RONALD SIMMONS, on behalf of themselves and all other persons similarly situated; ROBERT DANBOM and HARRY VIX, on behalf of themselves and all other persons similarly situated; WILLIAM BAYER and BERT DAVIS, on behalf of themselves and all other persons similarly situated; GEORGE WING, on behalf of himself and all other persons similarly situated; and GARTH BELKNAP and ROBERT RAY, on behalf of themselves and all other persons similarly situated,

Petitioners,

vs.

STATE TEACHERS' RETIREMENT SYSTEM and TEACHERS' RETIREMENT BOARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Despite this court's ruling in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), should retroactive relief to 1978 be awarded in a case in which a State provided retirement options based in part on sex-related actuarial tables?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Respondents respectfully submit that this case is governed by *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983). A petition for writ of certiorari will not serve to review or clarify an important legal issue — the issues in this case have already been determined. There being no reason for review under Rule 17 of the Rules of the Supreme Court. The petition for writ of certiorari should be denied.

ARGUMENT STATING REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari asks this court to go over ground that it has covered once before. This case is governed by *Arizona Governing Committee, etc. v. Norris* 463 U.S. 1073 (1983). The petitioners are asking this court to reverse itself on the issue of retroactivity that was decided in *Norris.*

After three years, this is not the time to reverse *Norris.* Indeed, *Norris* was correctly decided on the issue of retroactivity and it was applied correctly in this case by the Court of Appeals. (*See Probe v. State Teachers' Retirement System*, 780 F.2d 776, at pp. 782-783 (9th Cir. 1986.))

Before *Norris*, there was *City of Los Angeles v. Manhart*, 435 U.S. 700 (1978). It answered some questions. It left

open the answers to many other questions. Its reach was narrow. (*Norris*, at p. 1099, Opinion of Justice Powell.)

In *Manhart*, the following language is found at pages 717-718:

> "[W]e do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to any employer-operated pension fund. Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market. Nor does it call into question the insurance industry practice of considering the composition of an employer's work force in determining the probabe cost of a retirement or death benefit plan. Finally, we recognize that in a case of this kind it may be necessary to take special care in fashioning appropriate relief." (Footnotes omitted.)

The petitioners nonetheless cling to the theory that *Manhart* completely revolutionized the pension and retirement industries and that retroactive relief must be afforded. Obviously, the words of *Manhart*, buttressed by the court's *Norris* opinion, belie that conclusion.

Moreover, this case is much different than *Manhart*. In this case, contributions made by males and females are equal. Of that, there is no argument. Further (aside from the option features), equal benefits are paid out to all retirees based on years of service, final compensation, and retirement age. The issue of sex does not come into play at

all in computing the typical retiree's monthly allowance. It only is a factor under the option system. Finally, the retiree is not locked into the system. He or she may withdraw the contributions made and go into the open market to purchase protection, or anything else for that matter. Such an arrangement was implicitly sanctioned by *Manhart, supra*, at pages 717-718.

In 1983, this court addressed the issue of retroactivity in these pension cases in *Arizona Governing Committee etc. v. Norris*, 463 U.S. 1073 (1983).

In *Norris*, it was held that the use of mortality tables based on sex in an employer's retirement system is a violation of Title VII. However, because of the novelty of this concept, no relief was to be effective until August 1, 1983. And that relief was to be only with respect to *benefits derived from contributions made* after that date. *Norris* is a prospective decision and a prospective decision only. Of course, the Court of Appeals understood and ruled in accordance with the *Norris* decision.

The following is stated at pages 1074-1075 of *Norris* in the "per curiam" order which is the preamble to the court's opinion:

> "The Court holds that this practice does constitute discrimination on the basis of sex in violation of Title VII, and that all retirement benefits derived from contributions made after the decision today must be calculated without regard to the sex of the beneficiary. . . . The Court further holds that benefits derived from contributions made prior to this decision may be calculated as provided by the existing terms of the Arizona plan."

As stated by Justice Powell in his opinion at page 1105 of *Norris:*

> "To approve this (retroactive) award would be both unprecedented and manifestly unjust."

The Justice then went on at pages 1105-1106 of the opinion to note the unfairness of retroactive relief in such cases, how retroactive relief was denied in *Manhart*, how such a remedy would be "disruptive" and "drastic" so as to jeopardize the interest of both the insured and the insurer. He had previously noted at page 1099 the narrowness of the question presented in *Manhart.*

The Justice further noted that unfairness of imposing "unanticipated financial burdens" now "when many states and local governments are struggling to meet substantial financial deficits." He stated that the results would be devastating. (*Norris*, at pp. 1106-1107.)

Further in footnote 12, on page 1107 of *Norris* comes the conclusion from Justice Powell (that is shared by Justice O'Connor at page 1111 of her concurring opinion) that "only benefits derived from contributions collected after the effective date of the judgment need be calculated without regard to the sex of the employee."

Even though, in this case, contributions do not directly define benefits, (benefits are calculated from salary, age, and years of service credit) the principle remains the same. In a defined benefit plan such as STRS, contributions are used to determine service credit and the service credit is a determining factor in the calculation of the retirement benefit. While the mathematics are somewhat different, the legal guidelines are constant. Service credit in STRS is calculated on the ratio of earned salary to earnable salary during the plan year and the contributions paid are based on earned salary. Therefore, all service credit earned after a

specific date is directly related to the contributions paid on a salary earned after that date.

As stated above, the Court of Appeal has correctly applied the *Norris* case to the facts at hand in the instant case. Its decision need not be disturbed.

CONCLUSION

The petition for Writ of Certiorari should be denied. This case does not fit the requirements of Rule 17.

DATED: May 8, 1986

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the State of California

N. EUGENE HILL, Chief
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